Supreme Court, U.S.
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No. 00-1196

# In the Supreme Court of the United States

WAL-MART STORES, INC.,
*Petitioner*,

v.

SHIRLEY K. ROGERS,
*Respondent*.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION

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## REASONS WHY WAL-MART'S PETITION SHOULD BE DENIED

The question presented by Wal-Mart's petition is as follows: "Does Rule 41(d) of the Federal Rules of Civil Procedure authorize awards of attorney fees?" Wal-Mart characterizes this as a question on which "at least four courts of appeals have taken a stand," adhering to three incompatible "schools of thought" and creating a "split" that is "recurring in nature and mature in its development." Petition, p. 9. In light of the admonition in Rule 15.2 of the Court's rules, plaintiff objects to Wal-Mart's characterization of the appellate court jurisprudence on this question.

Wal-Mart claims that the Eighth and Tenth Circuits have issued five decisions between them, joining the "school of thought that holds that district courts have discretion to award attorney fees as part of the costs that Rule 41(d) allows." Petition, p. 5. This is misleading. Only two of the decisions cited by Wal-Mart, Evans v. Safeway Stores, Inc., 623 F.2d 121 (8th Cir. 1980) and Meredith v. Stovall, 216 F.3d 1087 (10th Cir. 2000), even address the question presented. They do so in the most perfunctory, unanalyzed fashion possible. Evans, a *per curiam* opinion barely four paragraphs long, never analyzes the language of Rule 41(d) or the intent of its drafters. Meredith, an unpublished opinion, also contains no such analysis and relies without elaboration on a decision that addressed the propriety of fee awards under Rule 41(a)(2), not Rule 41(d).[1] While the lack

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[1] Of the three other circuit decisions cited by Wal-Mart as representative of the same school of thought, one does not relate to Rule 41 at all, Mercantile-Commerce Bank & Trust v. Southeast

of analysis in those two decisions perhaps should not be surprising given their peculiar circumstances – the Evans court did not have the benefit of briefs from both sides and the plaintiff/appellant in Meredith proceeded *pro se* – no one who reads those decisions can confuse their spare holdings with a mature, fully developed "school of thought."

Wal-Mart also claims that three Seventh Circuit decisions on Rule 41(d) represent another school of thought somehow in conflict with the Sixth Circuit's view of the question presented. This, too, is misleading. There is no difference between the Sixth Circuit's and the Seventh Circuit's answers to the central question whether Rule 41(d), as written, can be read to authorize an award of attorney fees. Both say it cannot. *Compare* Rogers v. Wal-Mart Stores, Inc., 230 F.3d 868 (6th Cir. 2000) [App., p. 10a] ("We hold that attorney fees are not available under Rule 41(d). The reason is simple – the rule does not explicitly provide for them.") *with* Esposito v. Piatrowski, 223 F.3d 497, 500 (7th Cir. 2000) ("There is no language in the text of Rule 41(d) indicating that Congress intended to alter the 'American Rule' as the rule does not refer to attorneys' fees as an awardable cost.").

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Ark. Levee Dist., 106 F.2d 966 (8th Cir. 1939); the other two pertain to the propriety of fee awards under Rule 41(a)(2), not Rule 41(d). Johnston v. Cartwright, 355 F.2d 32 (8th Cir. 1966); Nolen v. Henderson National Corp., 1993 WL 26817 (10th Cir.) (unpublished). Even the district court opinion on which Wal-Mart relies most heavily acknowledges that decisions addressing fee awards granted under Rule 41(a) "are not helpful in deciding" whether or not attorney fees may be awarded under Rule 41(d). Behrle v. Olshansky, 139 F.R.D. 370, 374 (W.D. Ark. 1991). To borrow Wal-Mart's analogy, one cannot discern the relational meaning of a term by looking at its *step*-siblings.

The fact that Seventh Circuit decisions approved attorney fee awards based on the added fact that the *federal* statutes on which the plaintiffs sued in those cases independently authorized such awards does not represent a difference of opinion between the Sixth and Seventh Circuits, much less one that is at all germane to this case. The Sixth Circuit never had an opportunity in this case to address that added feature of the Seventh Circuit cases. Granting certiorari would not afford the Court an opportunity to address that feature of the Seventh Circuit's decisions since this is a diversity action in which the common law of Tennessee supplies the rule of decision, no matter where the case might be tried, and no federal statutes are involved. There is no reason to think the Seventh Circuit would have decided this case any differently than the Sixth Circuit did. Depicting a circuit conflict befitting this Court's attention simply by juxtaposing decisions that addressed distinct situations is contrary to Rule 10(a), which requires that the appellate decision proposed for review be "in conflict with another United States court of appeals *on the same important matter* . . . ." (Emphasis added.)

The same fault that the Sixth Circuit found with district court opinions addressing the question presented – long on policy, but short on textual analysis – applies to Wal-Mart's petition as well. The fact that the nation's largest retailer and now the United States Chamber of Commerce are throwing their massive weight onto a small issue that the circuits have not even disagreed about meaningfully, and that these commercial behemoths are advancing *policy* arguments in urging review, ought to give the Court pause. This issue is a long way from being, as Wal-Mart says, "mature in its development" and "ripe for review." Petition, p. 9. Not a single circuit decision cited by Wal-Mart, for example, explores the implications of imposing dismissal/refiling-

triggered attorney fees in contexts such as: diversity cases; when the first dismissed case was a state action; when the state granted the plaintiff the right to dismiss the first action without a penalty akin to Rule 41(d); or when the second court has no record of what happened in the first action other than the dismissal, and, thus, no objective basis for judging the reasonableness of the defendant's attorney fees. Until the circuits have explored the question presented in all of its important settings, it is not worthy of this Court's attention.

## CONCLUSION

Wal-Mart's petition should be denied.

Respectfully submitted,

/s/_____
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